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October 1, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
Room Number TWB-204
445 12th Street, S.W.
Washington, DC, 20554

Re: In the Matter of the Merger of Qwest Communications International, Inc. and U S West Inc., Docket CC99-272

Dear Ms. Salas:

On behalf of AT&T Corp.)"AT&T"), please find enclosed an original plus four copies of AT&T's Comments in the above reference proceeding in response to the Public Notice issued September 1, 1999. Please direct any questions to the undersigned.

Respectfully submitted,

Aryeh S. Friedman /
Aryeh S. Friedman /dkw

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Before the
Federal Communications Commission
Washington, DC 20554

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In the Matter of	)	
	)	
Merger of Qwest Communications International, Inc. and U S West Inc.	))))	Docket CC-99-272

<u>COMMENTS OF AT&T CORP.</u>

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October 1, 1999

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COMMENTS OF AT&T CORP.

Pursuant to the Public Notice issued by the Commission on September 1, 1999, AT&T Corp. ("AT&T") respectfully submits its Comments to the Joint Application of Qwest Communications International, Inc. ("Qwest") and U S West, Inc., ("U S West") (collectively "Applicants") for authority to transfer control of U S West's licenses to Qwest (hereinafter referred to as the "Application and Public Interest Statement"). The Application and Public Interest Statement provides only vague assurances that the Applicants will take the steps before closing the merger necessary to avoid violating Section 271 of the Telecommunications Act of 1976 ("1996 Act"), 47 U.S.C. § 271. Particularly in light of the Applicants' prior positions on Section 271, the Application should only be granted if the Applicants submit a detailed plan as to the steps they intend to take to ensure, before the merger closes, that they will not violate Section 271, and the Commission allows interested parties sufficient time to comment on that plan.

INTRODUCTION AND SUMMARY

Section 271(a) of the1996 Act flatly prohibits a Regional Bell Operating Company ("RBOC") such as U S West from providing interLATA service in a state within its region, unless and until it obtains an order from the Commission finding that it has satisfied all of the requirements specified in Section 271(d). It is undisputed that to date U S West has not applied for, much less received, an order from the Commission authorizing it to provide interLATA service in any of its 14 "in-region" states. It is likewise undisputed that Qwest provides an array of interLATA services throughout U S West's territory. Thus, if the merged firm continues to provide these services without having first received interLATA authorization, it will be in violation of Section 271(a). A proposed merger that, if completed, would result in unlawful conduct is not "consistent with the public interest," and must therefore be denied.

The Applicants concede, therefore, that prior to closing the merger, Qwest must divest itself of "all of its in-region interLATA services prior to the merger closing." Application and Public Interest Statement at 3, see also at 13-14.[1] Yet the Application and Public Interest Statement contain virtually no information about how the Applicants will resolve the serious Section 271 issues raised by their proposed transaction. Applicants offer only their assurances that they will take unspecified steps to comply with unspecified "standard processes" and likewise unspecified "applicable requirements" that will, in their opinion, remove any possibility that their merger will result in Section 271 violations.

These unsupported and unexplained assurances would be wholly insufficient even if offered by parties who did not have a history of adopting unreasonably narrow constructions of the scope of Section 271. They are especially suspect in the case of Qwest and U S West, who have repeatedly engaged or threatened to engage in conduct

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[1] There Applicants similarly assert that "Qwest is committed to divest itself of all of its services that otherwise would violate Section 271. As of closing, Qwest will not be providing any RBOC-prohibited in-region interLATA services."

that the Commission has held to be inconsistent with Section 271. This history underscores the importance of Applicants making available to interested parties information that is sufficiently detailed to enable the Commission to make an independent determination that their transaction will not result in unlawful activity.

On the current record, the Applicants have not met their burden of showing that the merger is in the public interest. The Application should only be granted if the Applicants submit a detailed plan as to the steps they intend to take to ensure that they will not violate Section 271, and the Commission allows interested parties sufficient time to comment on that plan.

ARGUMENT

Applicants bear the burden of demonstrating that their merger is "in the public interest."[2] Yet Applicants have done no more than provide blanket assurances that whatever it is they choose to do will, in their opinion, eliminate any concern that the merged firm will violate Section 271.

The Applicants' "showing" consists entirely of the following otherwise unsubstantiated assertions: First, Qwest will transfer a subset of its in-region customers (i.e. presubscribed retail long distance customers, excluding, e.g., in-region wholesale customers).[3] Second, the Applicants note that they are "familiar with the standard processes" for transferring customers, although they never identify what processes they are referring to, and agree only to "comply" with unidentified "applicable requirements in

2 Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom Inc., Memorandum Opinion and Order, CC Docket No. 97-211, 13 FCC Rcd 18025 (rel. Sept. 14, 1998) ("WorldCom-MCI Order"), at 18031 ¶10 and n.33; Cf. ¶220 and n. 640.

this area and ensure that customers experience no service disruption or other adverse impact."[4] Finally, the Applicants state they will "discontinue" some, and will "reconfigure" other, only partially identified services, never stating what "discontinue" or "reconfigure" means, never describing the full set of services that will be either "discontinued" or "reconfigured," and never explaining how e.g., "reconfiguring" interLATA services originating in-region will cure the Section 271 violation. That is clearly not enough.

I. ABSENT THE PROVISION OF FURTHER DETAILED INFORMATION IT IS NOT AT ALL APPARENT THAT THE MERGER WILL NOT VIOLATE SECTION 271 OF THE 1996 ACT.

A. Section 271 Precludes the Applicants from Providing In-Region InterLATA Service

Though their disclosure of Qwest's in-region interLATA activities is inadequate,[5] the Applicants do not dispute that Qwest provides interLATA service within U S West territory. Indeed other Qwest filings and public documents, including presentations to the investment community, clearly indicate that it has a sizeable national interLATA business, including long distance and Internet facilities and services, and that a material portion of this business originates in U S West's territory.

Qwest's Communications Services estimates that its national 1999 revenue will be approximately $3.6 billion.[6] Qwest provides Internet-based telecommunications

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3 Application and Public Interest Statement at 14.

4 Id. (emphasis added).

5 The extent of Qwest's provision of such in-region service, including a listing of all types of services provided and the number of subscribers to, and revenue obtained from the provision of, such services, is not described.

6 Merger Presentation, http://www.qwest.com/qwest/index.html slide7; February 24, 1989 Investment Community Conference,

services to approximately 4 million customers worldwide.[7] Qwest's North American network extends at least 18,500 miles and "includes the first nationwide 2.4 gigabit Internet Protocol ["IP"] Network, which is the backbone for Qwest's IP-based service."[8] The U.S. segment "includes 15 rings reaching from San Diego to Boston and Miami to Seattle."[9] The network "supports all Internet-enabled services, such as virtual private networks, voice over the Internet, video and data."[10] The Qwest network goes east and west through U S West territory, with additional north south segments between Denver, Colorado and New Mexico,[11] Seattle, Washington and Portland, Oregon;[12] Salt Lake

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www.quest.com/ir/qwst_summary.htm and http://media.corporate-ir.net/media_files/nsd/qwst/qwst_web/sld001.htm (Qwest's February 24, 1989 Presentation"), slide 19.

7 Merger Presentation, slide 7; Qwest's February 24, 1989 Presentation at slide 10 and Qwest's 1998 annual report http://www.qwest.com/annual_report98/index2.html.

8 Qwest's 1998 Annual Report, http://www.qwest.com/annual_report98/network/usnet.html .

9 Id. http://www.qwest.com/annual_report98/network/intro.html

10 Id.

11 In the Matter of the Application of Qwest Communications Corporation, LCI International Telecom Corp., USLD Communications, Inc. and U S West, Communications Inc., for Approval of the Merger of their Parent Corporations, Qwest Communications International Inc. and U S West, Inc., Docket N0. 99-A-407, Direct Testimony of Paul F. Gallant on Behalf of Qwest Communications Corporation, LCI International Telecom Corp., and USLD Communications, Inc., dated August 19, 1999 ("Qwest's Colorado Testimony") Appended hereto as Exhibit A, at 4, lines 8-12.

12 In the Matter of Merger of the Parent Corporations of Qwest Communications Corporation, LCI International Telecom Corp., USLD Communications, Inc., Phoenix Network, Inc. and US WEST Communications, Inc., Docket No. UT-991358, Direct Testimony of Paul F. Gallant on Behalf of Qwest Communications Corporation, LCI International Telecom Corp., and USLD Communications, Inc. and Phoenix Network, Inc., dated August 31, 1999 ("Qwest's Washington Testimony"), appended hereto as Exhibit C at 4, lines 1-2.

City, Utah and Boise Idaho;[13] and from Des Moines, Iowa to Minneapolis, Minnesota and from Minneapolis into Wisconsin.[14] Qwest's infrastructure includes TeraPOPs in Seattle and Denver.[15] In announcing the merger Qwest and US West noted that a Qwest/US West would create the "largest worldwide IP backbone, most frame relay switches and largest worldwide applications service provider" with TeraPOPs in Denver, Seattle, Portland, Minneapolis, Phoenix and other locations within US West territory.[16]

Qwest also provides long distance and operator services on both a facilities-based and resale basis.[17] Qwest is headquartered in Denver, and within the state of Colorado Qwest serves more than 16,000 residential customers and nearly 6,500 business customers.[18] In Wyoming Qwest serves nearly 13,000 residential customers and more

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13 In the Matter of Merger of the Parent Corporations of Qwest Communications Corporation, LCI International Telecom Corp. and US WEST Communications, Inc., Docket No. 99-049-41, Direct Testimony of Paul F. Gallant on behalf of Qwest Communications Corporation and LCI International Telecom Corp. dated August 19, 1999 ("Qwest's Utah Testimony"), appended hereto as Exhibit D at 4.

14 In the Matter of Merger of the Parent Corporations of Qwest Communications Corporation, LCI International Telecom Corp., USLD Communications, Inc., Phoenix Network, Inc. and U S WEST Communications, Inc., Docket No. Docket No P3009, 3052, 5096, 421, 3017/PA-99-1192 Direct Testimony of Paul F. Gallant on Behalf of Qwest Communications Corporation, LCI International Telecom Corp., and USLD Communications, Inc. and Phoenix Network, Inc., dated August 14, 1999 ("Qwest's Minnesota Testimony"), appended hereto as Exhibit E, at 4, para.9.

15 Qwest's February 24 Presentation, slide 46.

16 Merger Presentation, slide 13.

17 Including its subsidiaries Qwest Communications Corporation, LCI International Telecom Corp. (d/b/a Qwest communications Services) and USLD Communications, Inc. and Phoenix Network, Inc. See, e.g., Qwest's Colorado Testimony at 3, lines 11-16; Qwest's Washington Testimony at 3, lines 8-11; Qwest's Utah Testimony at 3 and Qwest's Minnesota Testimony at 3, para. 7.

18 Qwest's Colorado Testimony at 3, lines 17 through 19.

than 300 business customers;[19] in Washington state, Qwest has 198,000 residential customers and 3,000 business customers.[20] In Utah Qwest serves more than 55,000 residential customers and more than 1,000 business customers,[21] and in Minnesota Qwest has 114,000 residential customers and 5,300 business customers.[22] The data from the other U S West states is not available to AT&T, but the Commission found in 1998 that, as a result of U S West's unlawful marketing of Qwest long distance service in six of its fourteen states, Qwest obtained at least 130,000 long distance subscribers in less than one month."[23]

Qwest also provides interLATA Internet services in U S West territory. Qwest Internet Solutions Product Offerings include Direct Internet Access, Dial Up ISP, DSL, IP Solutions and Value Added Network services.[24] Qwest touts itself as the primary backbone provider for Internet Service Providers ("ISP's") including at least one headquartered within U S West's region (Electric Lightwave Inc.).[25] Moreover Qwest

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19 In the Matter of Merger of the Parent Corporations of Qwest Communications Corporation, LCI International Telecom Corp., USLD Communications, Inc., Phoenix Network, Inc. and US WEST Communications, Inc., Docket No. 70000-EA-99-503, Direct Testimony of Paul F. Gallant on Behalf of Qwest Communications Corporation, LCI International Telecom Corp., and USLD Communications, Inc. and Phoenix Network, Inc., dated August 19, 1999, at 3, lines 7 through 9, appended hereto as Exhibit B.

20 Qwest's Washington Testimony at 3, lines 12-14.

21 Qwest's Utah Testimony at 3, lines 12-14.

22 Qwest's Minnesota Testimony at 3, paragraph 7.

23 Memorandum Opinion and Order, In the Matter of AT&T Corporation et al. v. Ameritech Corp. et al., File Nos. E-98-41, E-98-42 and E-98-43, 1998 FCC LEXIS 5192, (rel. September 28, 1998), aff'd sub nom. U S West v. FCC, 177 F.3d 1057 (D.C. Cir. 1999) ¶16.

24 Id. slide 53.

25 Id. slide 74. Other ISPs include Verio, Cable & Wireless and Mindspring.

claims that it has leveraged its Internet2 sponsorship into university and state government markets, so that today 25% of Internet2 universities are current customers.[26]

Because Qwest carries interLATA traffic that originates in U S West's territories, provision of those services by the merged entity before compliance with Section 271 violates that section. See 47 U.S.C. §§ 153(42), 271 (defining "interLATA services" and prohibiting RBOC provision of in-region, interLATA services). Indeed U S West effectively conceded—as it had to—that Section 271 precludes it from owning in-region Internet backbone facilities when it filed a petition with the Commission asking it to forbear from enforcing Section 271 against any Internet backbone facilities it sought to provide and operate.[27] Thus, the merger of U S West and Qwest would result in the merged entity providing prohibited interLATA services within U S West's region.

B. Particularly In Light of Applicants' Prior Positions on Section 271 and Long Distance, the FCC Should Insist on Detailed Disclosure.

Applicants must provide the Commission with additional information because Applicants' view as to what may be necessary to prevent the risk of unlawful conduct may differ from the Commission's. This is underscored by the Commission's rejection of the Applicants prior position in In the Matter of AT&T Corporation et al. v. Ameritech Corp. et al.[28] There the Commission rejected the Applicants' proposed definition of the word "provide" in Section 271 and found that as a result of the marketing arrangement with Qwest, U S West was "providing" in-region, interLATA services in violation of

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26 Id. slide 67.

27 Petition of U S West Communications Inc for Relief from Barriers to Deployment of Advanced Telecommunications Services, CC Docket No. 98-11.

28 See note 23, supra.

section 271.[29] The Commission concluded that to allow the "one stop shopping" arrangement before U S West received Section 271 approval eliminated U S West's incentives to open its local market,[30] and observed that the arrangement with Qwest afforded U S West a "first mover advantage,"[31] and would give it "a significant 'jumpstart'" when it did obtain 271 authorization" by pre-positioning long distance customers for the U S West Long Distance affiliate.[32] The Commission further found that by marketing Qwest's long distance and its own local services under its own brand, U S West was holding itself out as a provider of in-region interLATA services, and thereby competing in that market before it obtained permission to do so under § 271.[33] Finally, the Commission found that U S West and Ameritech were performing functions under their respective alliances with Qwest that typically were performed by entities that resell interLATA service, such as marketing, customer care, and establishing prices, terms and conditions.[34]

The Court of Appeals affirmed the Commission's interpretation of Section 271 and the need to maintain the Act's "powerful incentives" for the RBOCs to open their markets.[35] The Court of Appeals noted that "[t]here appears to have been specific

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29 Id., ¶38 (emphasis added).

30 Id., ¶39.

31 Id., ¶40.

32 Id., ¶41.

33 Id., ¶45.

34 Id., ¶46.

35 U S West v. FCC, supra, 177 F.3d at 1060.

congressional concern over the impact of jointly marketed local and long distance services."[36]

Thus, for example, a transfer of customers to a transferee who agrees to a joint marketing arrangement, or a transfer to a reseller who explicitly or implicitly agrees to re-transfer the customers upon U S West obtaining Section 271 authorization could similarly give the Applicants "a significant 'jumpstart' when they do obtain 271 authorization" by pre-positioning long distance customers for the U S West Long Distance affiliate. Accordingly, on this issue the Commission should insist on detailed disclosure of the terms and conditions relating to the transfer of customers.

II. THE COMMISSION SHOULD REQUIRE THE APPLICANTS TO SUPPLEMENT THEIR SUBMISSION WITH SPECIFIC DETAILS AS TO HOW THEY WILL COMPLY WITH SECTION 271 BEFORE THE APPLICATION IS APPROVED.

The Application and Public Interest Statement, while conceding the Section 271 issues, provides no details as to what the Applicants intend to divest, how they will make that divestiture, and what their relationship is, and will be, with the party or parties to whom the divestiture is made, in order to be in compliance with Section 271.

The Applicants state that Qwest will "transfer" only "presubscribed retail customers in the U S West region to another carrier or carriers."[37] The Applicants note that Qwest "is familiar with the standard processes for the transfer of long distance customers from one non-dominant carrier to another" and that it "will comply with applicable requirements in this area, and ensure that customers experience no service

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36 Id.

37 Application and Public Interest Statement at 14 (emphasis added).

disruption or adverse impact."[38] Significantly, Applicants do not cite to or otherwise identify the "standard processes" and "applicable requirements" with which they pledge to comply. It is impossible, therefore, for Commenters to address, or the Commission to find, that these are even the appropriate "processes" and "requirements." There is likewise no information about what U S West will do, so it is impossible for Commenters to address or the Commission to make findings about their adequacy.

The Applicants further state that they will "discontinue providing other in-region interLATA services, including in-region calling card services and prohibited 800 and private line services," and "will reconfigure other services, such as Internet access, web hosting and similar activities."[39] Again, Applicants provide no information that will enable Commenters to address, or the Commission to find, that these measures will adequately address the Section 271 issues.

More information is necessary from the Applicants before they have met their burden of establishing that the merger is in the public interest and before the Commission can approve their Application. Information that should be provided includes:

1. A complete description of what precisely will be transferred. The Application does not disclose what Qwest intends to do with respect to interLATA services provided to customers other than its "presubscribed retail customers" including its large wholesale customer base[40] and the in-region parts of its Internet backbone. At a minimum the additional disclosure of what precisely will be transferred should include a

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38 Id.

39 Id.

40 Qwest February 24, 1999 Presentation at Slides 21-22. This includes other carriers (resellers) and ISPs.

complete description of all customers, retail and wholesale, business and residential, and all assets, to be transferred.[41]

2. Because the Application does not disclose what "standard processes" for the transfer of interLATA customers" and what "applicable requirements" the Applicants will follow, the Commission should require a statement from the Applicants that they will fully comply with the authorization and verification requirements of the Commission's rules and Carrier Change Orders.[42] This includes an express affirmation that the Applicants will advise customers that they have a choice of carriers and includes verification of presubscription changes to avoid slamming.[43]

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41 If necessary, such information could be provided subject to a reasonably drafted Protective Order that will permit third party comment.

42 47 C.F.R. §63.71. See, In the Matters of Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996 and Petition for Forbearance of the Independent Telephone & Telecommunications Alliance, CC Docket Nos. 97-11 and 98-43 (rel. June 30, 1999); Implementation of the Subscriber's Carrier Selection Changes Provisions of the Telecommunications Act of 1996 and Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, CC Docket No. 94-129, Further Notice of Proposed Rule Making and Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 10674 (1997), Second Report and Order and Further Notice of Proposed Rule Making, 14 FCC Rcd 1508 (1998) (Section 258 Order), stayed in part, MCI WorldCom v. FCC, No. 99-1125 (D.C. Cir. May 18, 1999); Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, CC Docket No. 94-129, Report and Order, 10 FCC Rcd 9560 (1995), stayed in part, 11 FCC Rcd 856 (1995); Policies and Rules Concerning Changing Long Distance Carriers, CC Docket No. 91-64, 7 FCC Rcd 1038 (1992), reconsideration denied, 8 FCC Rcd 3215 (1993) (PIC Change Recon. Order); Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, 101 F.C.C. 2d 911 (Allocation Order), 101 F.C.C. 2d. 935 (Waiver Order), reconsideration denied, 102 F.C.C.2d 503 (1985) (Reconsideration Order).

43 Waiver is not appropriate here. Waiver of the Commission's rules is appropriate "only if special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest" such as avoiding Year-2000-related service disruptions, In the Matter of Implementation of the Subscriber Carrier Selection Changes provisions of the Telecommunications Act of 1996; AT&T Corporation Request for Waiver, CC Docket No. 94-129, 1999 FCC LEXIS 4161

3. Because the Application does not disclose what interLATA operations and facilities Qwest has in U S West's region, and what the Applicants will do in connection with each such operation and facility to ensure that each such operation and facility will not be used to violate Section 271 upon completion of the merger:

(a) a complete, service-by-service description of the in-region interLATA services that will be "discontinued." This would include a complete list of what the Applicants consider to be the included "prohibited 800 and private line services."

(b) a complete step-by-step description of what Applicants will do to "discontinue" the services identified above so that they will be in compliance with Section 271 prior to the closing of their merger.

(c) a complete, service-by-service description of the services to be "reconfigured." This would include a complete identification, by service and/or activity, of the services/activities that fall within "similar activities with the interLATA restrictions of Section 271."

(d) a complete step-by-step description of what Applicants will do to "reconfigure" the services identified above so that they will be in compliance with Section 271 prior to the closing of their merger.

(rel. August 27, 1999), or the Chapter 11 bankruptcy of a carrier. In the Matter of Implementation of the Subscriber Carrier Selection Changes provisions of the Telecommunications Act of 1996; Primus Telecommunications Group Inc. Petition for Waiver, CC Docket No. 94-129, 1999 FCC LEXIS 3731 (rel. August 5, 1999). Avoidance of Section 271 obligations does not have that same level of immediacy as to justify the obligation to obtain the consent of the subscribers being transferred required because of the potential impact on consumers of the discontinuance, reduction or impairment of service by a carrier.

4. Because the Application does not disclose what if any, arrangements or understanding Qwest will enter into with any entities to whom it divests its assets or customers and whether the Applicants intend to enter into joint marketing arrangements, or any arrangement or understanding that will require the entities to whom it divests its facilities or assets to return them to the Applicants at any time:

(a) a complete description of the terms and conditions of the customer transfer to assure that the transfer will effectively cure the Section 271 violation. This would include the disclosure of any covenants or understandings, expressed or implied, by the transferee to return the transferred customers to the Applicants' long distance affiliate at some future point in time. It would also include assurances that the Applicants would and could not discriminate in favor of the transferee in the provision of local, local exchange or local toll services after the transfer of customers.

(b) a complete description of the qualifications/disqualifications of the potential transferee to assure that the transfer will effectively cure the Section 271 violation (e.g. the transferee must be viable, able to provide the same services to the transferred customers at the same or better terms and conditions; cannot be an affiliate or related party); and

(c) a complete description of any marketing, joint marketing or co-marketing arrangement with the transferee. This would include a statement regarding any changes to the terms and conditions upon which U S West will provide access service to such the transferee as a result of or coincident with the transfer.

5. A complete description of how the Applicants intend to comply with their commitments regarding all the matters identified above prior to the closing of the merger.

6. A complete description of the process whereby the Commission and interested third parties will be able to (a) review the Applicants' compliance with their commitments regarding all the matters identified above, and (b) determine whether or not as a result of their compliance the merger would still violate Section 271, prior to the closing of the merger.

CONCLUSION

For the reasons stated above, the Application should only be granted if the Applicants submit a detailed plan as to the steps they intend to take to ensure that they will not violate Section 271, and the Commission allows interested parties sufficient time to comment on that plan.

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October 1, 1999

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